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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Appellate No. 264

EDGAR SMITH,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

WILLIAM RICHTER,
Attorney for Petitioner,
160 Broadway,
New York City 38, N. Y.

ROBERT W. HICKS,
Of Counsel,
1920 Eye Street, N.W.,
Washington 6, D. C.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050-51 110

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REPLY

POINT I

The opposition of the respondent is based upon a false premise that proper objection was not made by the petitioner in the court below as to the admission into evidence of the "confession" which denied due process under the 14th Amendment to the petitioner; it unequivocally appears in the record, more particularly when the Supreme Court of the State of New Jersey ruled "—we will treat the confession as though its introduction had been opposed upon every conceivable legal ground".

A. The Supreme Court of New Jersey did pass upon the question of "voluntariness" of the "confession"—considering objection upon "every conceivable legal ground".

In the said Opinion of the State Supreme Court of New Jersey (27 N. J. 433 (1958)) regarding grounds relied upon in objecting to the introduction into evidence of the said controversial confession (Exhibit S-84) the said Appellate Court apparently cast aside any technicalities by ruling upon the "voluntariness" objection by trial counsel and holding:

> "Although we have difficulty concerning the error upon which the defendant actually relies, we will treat the confession as though its introduction had been opposed upon *every conceivable legal ground.*" [Opinion (Appx. New Jersey Supreme Court; p. 25] (italics supplied)

This point was included (although not emphasized) in petitioner's original brief (p. 33), but apparently "escaped the attention" of the respondent. We there said:

"Even though the legal grounds of objection to the confession was in doubt on the trial and upon appeal, which doubt was attributable to inadequacy of counsel, the State Supreme Court held:

> "The confession was treated on appeal as though its introduction had been opposed on every conceivable ground."

Of course, we need not point up that "every conceivable legal ground" concededly would include the "involuntary" objection that was raised at the trial and every State or Federal objection constituting a denial of due process of law. Thus, if the highest Court in the State of New Jersey saw fit to pass upon "every conceivable legal ground" concerning the admissibility of this controversial and pivotal "confession" (the sole and primary evidence in the people's case) then we cannot understand the respondent's concern in so vehemently seeking to forestall this Honorable Court's passing upon the same questions.

In reply, we submit (to paraphrase Shakespeare) "me thinks the 'prosecutor', he protesteth too much."

So, despite the respondent's argument to the contrary (Points One and Two) proper objection "upon every conceivable legal ground" was *concededly* raised (*supra*) both at the trial and upon appeal to the New Jersey Supreme Court. This is conclusively shown by the Court's ruling on this vital point (*supra*).

The respondent's evasive and vituperative brief in opposition is reminiscent of the legal classic of admonition: "when the facts are with you—shout the facts; when the law is with you—shout the law; but when neither the facts nor the law are with you—just shout!"

And, so the prosecutor shouts "lies", "half-truths", "falsehoods", "frivolous", etc. at the petitioner and his

present counsel, but utterly fails to point out wherein we falsify, distort or indulge in frivolities. The prosecutor himself distorts, misquotes and half-quotes the record in an abortive attempt to justify this bald and cowardly assertion.

This is indeed a ghastly "accusation" against petitioner's present counsel considering a man's life is in the balance of justice.

Respondent, at pages 16-17 of his brief, supplies italics to emphasize portions of the opinion of the State Supreme Court of New Jersey, to suit its purpose, but is remiss to tell this Honorable Court that the said Court below held further, as noted herein, that: "* * * we will treat the confession as though its introduction had been opposed *upon every conceivable legal ground.*"

If the prosecutor had completed the full quote on this point (and properly and fairly so) by the State Supreme Court of New Jersey, it would have foreclosed his present main argument; it consumes much of his opposing brief from pages 14 through 40 on this vital point.

B. The trial court did pass upon the question of "voluntariness" of the "confession" after objection, argument and hearing.

Counsel for petitioner at the trial *did object to the "voluntariness" of the confession* (pp. 537a to 538a; 544a to 551a) and the appeal Court thereafter encompassed "every conceivable legal ground" (*supra*) of objection to the introduction of the controversial "confession"; we must thus look to the substance and not the words to conclude that taken together, the "involuntary" objection by petitioner and the subsequent concession by the Appellate Court preserved the petitioner's rights under the due process clause of the Fifth and Fourteenth Amendments.

The petitioner did object to the admission into evidence of the said confession at his trial *as to its being involuntary.* Trial counsel at first objected to its admission as not to be considered as a "confession" and then when the court concluded it was to be treated as a confession, trial counsel objected to its "voluntariness" specially setting up the opposition to its admission as to the "*state of mind (of petitioner), and the circumstances, all of which led up to the event, all of which would go into the voluntariness of the statement*". (p. 537a).

Although there was some "confusion" as to the objection to the confession (as the Supreme Court of New Jersey observed and then clarified in its Opinion (*supra*), the prosecutor in his brief failed and neglected to include this colloquy with the trial court as to the confession:

> "Mr. Selser: Yes, sir, I think too I should like to call Smith with regard to it and have some testimony taken with regard to it and have some testimony taken with regard to the circumstances preceding the taking up to the time of the taking.
>
> The Court: As to the voluntariness?
>
> Mr. Selser: Yes, as to the voluntariness, as to his state of mind, all of which led up to the event, all of which would go into the voluntariness of the statement.
>
> The Court: All right (p. 537a)
>
> The Court: That is perfectly in order and proper. In other words, what we are doing now is reopening the question of the voluntariness which had previously been stipulated in the course of the trial and entering upon a hearing outside the presence of the jury on the issue of the voluntariness of this document or statement as a confession.
>
> Do you understand?
>
> Mr. Selser: Yes, I understand.

The Court: 'And both sides will have the opportunity to furnish evidence outside the hearing of the jury on that question and I will pass upon it outside the presence of the jury, on that question.'' (pp. 538a to 539a)

Thereafter, a preliminary (although cursory) examination was conducted solely on the question of ''voluntariness'' of said confession (p. 538a). The said objection as to its being involuntary certainly was sufficient basis to perform the objection of a denial of due process under the Fourteenth Amendment.

However, the Court concluded that the confession was ''voluntary'' and so instructed the jury. *Instead of leaving that all-important question of ''voluntariness'' to the trial jury*, the trial judge concluded that it was ''voluntary'' and merely left to the jury the question of (as he put it) ''credibility'' (p. 963a).

The respondent's present argument that ''the question whether defendant was denied due process of law under the 14th Amendment not having been raised at the trial or on the appeal and not having been passed upon by the New Jersey Supreme Court'' is wholly without merit; the prosecutor distorts, misquotes and half-quotes the record in this desperate effort to keep the petitioner out of the jurisdiction of this Honorable Court.

The full text of the record proves otherwise. Objection to the ''voluntariness'' of the confession was timely made and subsequently bolstered by the Appellate Court's ruling (*supra*) that in any event, it would consider that the objection was upon *every conceivable legal ground*. (''Opinion'' New Jersey Supreme Court, *supra*)

Of course, ''every conceivable legal ground'' (as the State Supreme Court of New Jersey so ruled) includes

every legal ground as set forth in the petitioner's brief (Point I) presenting the question whether the confession was properly admitted into evidence under the Fourteenth Amendment.

To say that the Supreme Court in New Jersey only passed upon "State" questions concerning the said "confession" (as the prosecutor would have it) would give the Court's ruling (*supra*) a most narrow, distorted and limited interpretation of its ruling, not justified in fact or law.

Certainly, if the said appellate court made such an assumption or concession and reviewed the case, treating *the confession*, as though its introduction had been opposed upon "every conceivable legal ground", *this Honorable Court should do no less.*

If the Supreme Court of New Jersey, in doubt as to the accuracy or definiteness (as it points out) of the defendant's objection to the controversial confession, convicting petitioner in this capital case and treated the objection as encompassing "every conceivable legal ground" of objection to said confession, certainly the prosecutor should not be heard to complain, when a young ex-Marine's life is at stake at this posture of the case.

We don't think even the prosecutor could reasonably and fairly argue that the Supreme Court of New Jersey could not lawfully make the assumption or concession it did in the interests of Justice.

So, contrary to the respondent's present argument, it also affirmatively appears from the record that "every conceivable legal question", including State and Federal questions, (concerning the "confession") was presented to the highest Court of the State of New Jersey and was properly and specially set up by the Court itself when it ruled as hereinabove noted.

We submit that the Supreme Court of New Jersey, realizing this to be *a capital case*, did not dwell upon the niceties of the objections raised by trial counsel; *did pass upon this murder conviction as if "every conceivable legal objection" was raised to "this confession" which was instrumental in convicting petitioner and sentencing him to death.*

We apologize for belaboring this point but the prosecutor has made much of this "technical objection". We further submit that the Supreme Court of New Jersey considered this confession as if "every conceivable legal objection" that should have been raised was taken concerning any invasion of the petitioner's legal and constitutional rights; *and rightly so in this capital case.*

The holding of the Supreme Court of New Jersey that it would treat the confession as though its introduction had been opposed "on every conceivable legal ground" (the said phrase) must be and should be given the most liberal and fairest interpretation. The most liberal and fairest interpretation possible and favorable to the petitioner would include every legal objection to the admission into evidence of an unlawful confession that would preserve all his legal rights under the due process clause of the United States Constitution.

In the face of the holding by the high court of the State of New Jersey, we submit that this Honorable Court has jurisdiction in this matter *and* as pointed out in the petitioner's brief (Point I).

C. The prosecutor, despite his protests, "supports" petitioner's contention as to "massive interrogation" in relays of "inquisitors".

The respondent's brief (Point Two) substantially supports petitioner's contention (although "disputing" it) that the relays of police and prosecutor inquisitors (20 in number) questioned him as set forth in our brief.

The prosecutor's brief, despite his objection to our including the court stenographer (as was enumerated in the *Spano* case; see opinion of this Court) and the examining doctor, refers to fifteen (15) of the officials in at least 3 relays through the night and following day, participating in the continuous relays of "investigation" and "questioning" of this petitioner:

1. Det. Graber (p. 27) (reference to respdt's brief)
2. Invest. Garabedian—(p. 27)
3. Chief Asst. Prosec. Galda—(p. 27)
4. Police Chief Smith, Mahwah—(p. 27)
5. Capt. DeMarco—(p. 27)
6. Lt. Haight—(p. 27)
7. Capt. Wickham—(p. 28)
8. Det. Sinatra—(p. 28)
9. Det. O'Har—(p. 28)
10. Dr. Gilady—(p. 29)
11. Det. Spahr—(p. 29)
12. Det. Lisle—(p. 29)
13. Prosecutor Calissi—(p. 30)
14. Chief Voss, Ramsey—(p. 30)
15. Ehrenbeck, steno—(p. 31)

The prosecutor omits and the record discloses other officials participating as noted, to comprise twenty (20) in all, as contended and listed in petitioner's brief (p. 25).

16. Invest. Nuno—(p. 482) Reference to petitioner's ~~brief~~ trial record.

17. Invest. Perrapato—(p 482)

18. Lieut. Doremus, Ramsey—(p. 280)

19. Det. Ridgeway—(p. 280)

20. Det. Chief Stewart—(p. 481)

D. The prosecutor presently "minimizes" the presence of a "juror"; a member of the "current jury panel".

The prosecutor concedes that this "confession" was given in the prosecutor's office in the presence of a "juror", but characterizes him as a "disinterested spectator". Pray tell, why was he there if he had no interest in said criminal proceedings? The prosecutor also glosses over the matter lightly by stating that this juror was only on the "current jury panel" and not on the jury trial. We never urged that he was on the trial jury but on the "jury panel" which, in and of itself, is of serious consequence (Pet.'s brief, pp. P41-42). The same ("disinterested") "juror" was present at much of the other stages of the proceedings including the "investigation" and "questioning" of the petitioner.

That this is most irregular and unlawful needs no further argument to demonstrate. It should be considered a most serious invasion of petitioner's fundamental and constitutional rights and denial to him of a fair and impartial trial (Petitioner's brief pp. 41-42.)

The prosecutor seeks to minimize "massive interrogation" claimed herein by attempting to keep the petitioner out of the prolonged "investigation" and "questioning", although the record discloses petitioner was in it, every step—every minute of the way—by relays of police and

prosecuting officials, which literally dragged petitioner through the night and following day. The prosecutor would presently insult the court's intelligence referring to this inquisition as "general discussions".

Finally, the prosecutor defends himself in his "plea of innocence" brief—"No such thing here", he claims, as in the cases he cites therein, no such "*one thing*"; we agree; we have here an *accumulation of all things* abhored and condemned in said leading cases by this Honorable Court.

Rather than "examination and cross-examination", says the prosecutor, this "confession" was in narrative form. The "confession" (Ex. S-84) contains some 380 odd questions by the prosecutor of this petitioner!

E. The prosecutor presently describes his quasi-judicial proceeding" and the "unlawful confession" as a "courteous interview".

Concerning the prosecutor's present nonsensical characterization of the "confession" as a "temperate and courteous *interview*", may the petitioner respectfully recall the words of noted writer, John Mason Brown:

> "The prosecutor's by obligation is a special mind, mongoose quick, bullying, devious, unrelenting, forever baited to ensnare. It is almost duty bound to mislead, and by instinct dotes on confusing, and flourishes on weakness. Its search is for blemishes it can present as scars, its obligation to raise doubt or sour by suspicion. It asks questions not to learn but to convict, and can read guilt into the most innocent of answers.
>
> Its hope, its aim, its triumph is to addle a witness into confession by tricking, exhausting, or irritating him into a verbal indiscretions which sounds like a

damaging admission. The natural lapses of memory it gives the appearance either of strategems for hiding misdeeds or, worse still, of lies, dark and deliberate. Feigned and wheedling politeness, sarcasm that scalds, intimidation, surprise, and besmirchment by innuendo, association, or suggestion, at the same time that any intention to besmirch is denied—all these as methods and devices are such staples in the prosecutor's repertory that his mind turns to them by rote."

F. The prosecutor obtained the "controversial confession", under oath, contrary to the New Jersey Statute and the United States Constitution.

By whatever name the prosecutor seeks to refer to Rule 3:2-3 of the Rules of Criminal Procedure of the State of New Jersey, it is a statutory provision similar to Rule 5(a) of the Federal Rules of Criminal Procedure providing for "arraignment" without unnecessary delay, etc. and "hearing" etc., of a person accused of a crime (see *Mallory* case, petit's. brief, p. 38).

It is important to note that even under said statutory provisions of the State of New Jersey, the Magistrate shall inform the defendant of his right to counsel, etc., shall also inform the defendant of his "right to make a statement, *not under oath* as to the charge against him; that he is not required to make such a statement and any statement made by him may be used against him—" (emphasis ours)

Here not alone did the prosecutor usurp the functions of a Magistrate in the conduct of his own quasi-judicial proceeding, but he seriously and further violated the statute by obtaining a statement from petitioner *under oath* (confession Ex. S-84). The prosecutor, also unlawfully, failed to advise petitioner of his legal and constitutional rights, including his right to counsel and the right not to incrim-

inate himself. That this is contrary to the Fifth and Fourteenth Amendments of the United States Constitution is clear, indeed. Petitioner does not only claim the violation of this statute (*supra*) as the prosecutor now defends, but an accumulation of deprivation of petitioner's rights that make for a denial of due process (Point I, petitioner's brief).

G. The prosecutor utterly fails to answer petitioner's charge that he was unlawfully held as a "Defendant" charged with *"Murder"*, prior to "confession".

As to the "quasi-judicial proceeding" conducted by the prosecutor in obtaining the confession in question, he presently avoids the issue and fails to answer petitioner's contention more particularly that the face of the transcript itself (Ex. S-84) proves beyond question that the petitioner was a "Defendant" then charged with "Murder" (p. 18, petitioner's brief).

The only defense the prosecutor could now submit to this "unlawful confession" is his reference to this "temperate and courteous *interview*" (p. 33). How about the established fact that the confession was allegedly given *under oath* contrary to the New Jersey Statute (*supra*) and in violation of petitioner's constitutional rights, without arraignment, without advice and without counsel, etc. in this quasi-judicial proceeding? The prosecutor now has the temerity to refer to this outrage as a "courteous *interview*" (see p. 33 of respondent's brief).

The confession, as we contend, is violative of the United States Constitution, Amendments V, VI and XIV and of the Constitution of the State of New Jersey in Article I, Section 10.

The Constitution of the State of New Jersey provides:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

We also rely upon this constitutional provision to require the presence of the petitioner at the motion for the new trial (Pt. V[illegible]etit's Brief); which is considered an extension of the original criminal proceedings and trial.

As originally pointed out, this provision of the New Jersey Constitution was concededly never previously reviewed by a higher court (29 N. J. 561 (1959); Opinion p. 17).

H. The "confession" was the sole and primary evidence of the People's case.

The prosecutor cannot vacillate in his argument. We submit that the confession was the sole and primary evidence of the people's case; other "evidence" stems from the confession. If this not be so, then the prosecutor is trapped by the incongruity of his own argument since if he had sufficient material evidence, without the confession — then why did he so unnecessarily delay the arraignment of the petitioner (for 20 hours) and until he got his confession? Was the confession really to "solve" or "absolve" or was it, as we seriously contend herein, to crucify the petitioner?

The record discloses and the opinion of the Supreme Court of New Jersey supports our ground for review (by appropriate objection), by a denial of due process under the Fourteenth Amendment of the United States Constitution in the admission into evidence of the alleged "confession" of the petitioner.

Thus contrary to the prosecutor's present claims; the basis of such contention is urged herein:

1. Taking of the statement while held incommunicado for upwards of twenty (20) hours through a freezing cold night;

2. Around-the-clock prolonged and massive inquisition by in excess of a dozen officials, without counsel, no sleep, no rest, little food, and scant clothing;

3. Lack of advice as to his constitutional right to remain silent, etc. and right to counsel;

4. Failure to arraign etc.; and

5. Trickery and cajolery in attempting to get petitioner to sign the confession by a stealthily unauthorized visit to his prison cell and subsequent unlawful use of same against him (Point I, Petit's Brief).

I. The Supreme Court of New Jersey passed upon this capital case, viewing "every conceivable legal objection", more particularly to the "controversial confession"; thus preserving and protecting petitioner's fundamental and constitutional rights, irrespective of inadequacy or neglect of trial counsel.

With it all, the respondent adroitly avoids the real and all important issues at bar and attempts to confound justice herein by simply (and wrongfully) saying: "its non-federal" or "you didn't raise it before".

The prosecutor concludes "in any event every claim of error to the New Jersey Supreme Court was of a non-federal nature and was decided on state law". That this is an erroneous assumption and contrary to the holding of the State Court is clear indeed. "Federal" appears to be a "dreaded word" in the prosecutor's vocabulary and he appears most anxious to avoid being confronted with it before this Honorable Court.

Irrespective of whether the other errors claimed are of a federal nature (and we submit they are) the admission of the confession, the sole and primary evidence of the people's case, if considered to have been opposed upon "every conceivable legal ground" would, in the interest of justice, include every conceivable state and federal objection, as set forth in petitioner's brief. If its introduction had been opposed on "every conceivable legal ground" as the State Supreme Court of New Jersey assumed, it would assert a denial of due process, since we must look to the substance of the legal objection and not to the words; that is, the confession was not only objected to as "involuntary", but upon every conceivable legal ground!

We need not belabor petitioner's Points II, III and IV and unduly burden this Honorable Court by being presently drawn into a point by point, or line by line, defense of petitioner's contentions and answer to respondent's opposition arguments; suffice it to say that if the petition herein is granted, on the Writ of Certiorari, we shall adequately present our position, and most assuredly show this Honorable Court that our petition is most worthy of its serious consideration.

POINT II

The questions raised by petitioner (Points II, III and IV) as to denial of a fair and impartial trial, etc. were raised by objection in the trial Court and upon appeal and do present a further denial of due process.

A. The questions raised by petitioner, in this capital case, are of a substantial Federal nature, irrespective of the form of objection and errors presented by trial counsel, and it is within this Honorable Court's jurisdiction for review.

1. Trial counsel made a "general exception" to the Judge's entire charge (*after* the jury was retired; a required but "erroneous" *procedure*) (p. 969a).

2. Objection was made to the introduction into evidence of the gruesome and prejudicial enlarged color photographs at the petitioner's trial (p. 319a).

3. Objection was made to the prosecutor's summation (p. 942a).

4. As to inadequacy of counsel; it is ridiculous for the respondent to now suggest that trial counsel who argued the appeal failed to submit *his* inadequacy of defense representation and presentation to the Appellate Court; it would hardly be compatible. But, as a "witness" at the motion for the new trial, he testified as to his "inadequacy" (app. pp. 40a, 41a; 79a-182a).

a. Petitioner had no choice in the matter of selection of appeal counsel under the Murder One conviction and mandatory death sentence.

5. As to the failure of the Judge's charge, it was *the trial court's duty* to charge all degrees of homicide as an essential basic charge in homicide cases. The failure to

submit "manslaughter" as a possible verdict cannot be winked away by the present argument of respondent, that no such specific request was made by trial counsel.

a. Whether the crime charged was common law or statutory did not matter. It was concededly not a felony-murder and lawfully and fundamentally required a charge of all degrees of homicide; *anything less, was a denial of due process and a violation of the Bill of Rights and the Fourteenth Amendment to the United States Constitution.*

b. In any event, under the erroneous and prejudicial procedure, "exceptions" to the trial judge's charge were taken after the jury had retired for deliberation; this failure of essential charges could not then be corrected!

6. The prosecutor fails to answer why a lawyer was not called for the petitioner, but makes a point of calling in a "spiritual adviser"; who, incidentally, was not of petitioner's religious faith.

POINT III

The petitioner does not "assume" the questions raised in the "Questions Presented for Review" as the facts, but emphatically "submits" them to be the facts.

With a young man's life at stake, the prosecutor persists and seeks to play a "game of words". We do not equivocate, but reiterate with the same force and effect that the "Reasons for Granting Petition for Writ of Certiorari", as set forth in Petitioner's Brief herein, are the factual grounds enunciated and presented in the "Questions Presented for Review" (pp. 2-5; p. 12, Petitr's brief).

POINT IV

In a capital case, the inadequacy, failure and/or error of trial counsel shall not innure to the prejudice and detriment of petitioner-defendant; nor shall any State deprive any person of life or liberty without due process of law, in accordance with Sec. 1 of the Fourteenth Amendment of the United States Constitution.

In view of the limitation of time to present this reply and for the sake of brevity, at this preliminary posture of the case, petitioner reserves further argument for a more formal and detailed submission upon the Writ of Certiorari herein.

CONCLUSION

We submit that substantial constitutional questions concerning violations of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and a denial of due process have been properly raised by the petitioner, meriting review herein by this Honorable Court; therefore it is respectfully requested that in the interests of substantial justice that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM RICHTER,
Attorney for Petitioner.

ROBERT W. HICKS,
Of Counsel.